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# Criminal Law--Search Incident to Arrest for Traffic Violation--Plain View Doctrine--Consent

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attempt to present a case against the defendant in trial free of substantial legal error.

The United States Supreme Court has held that for a state to try a defendant after he has been acquitted by a federal court is not a violation of the double jeopardy prohibition. Double jeopardy only protects a defendant from successive prosecutions by the same sovereign.<sup>8</sup>

As indicated, when there is more than one offense involved in the act which the accused allegedly committed, the accused may be prosecuted for each offense; *i.e.*, without incurring the double jeopardy prohibition. The offenses must be capable of standing alone with all the necessary elements of each offense present. It is the individual offenses that are being tried and not the "act."

Kentucky's definition of double jeopardy is built on the same concept of separate offenses arising out of the same act that has been used in many courts from early times. By being able to find two separate offenses in the act committed by Runyon, the court was able to apply this separate offense idea. This application permitted the court to affirm the lower court's decision that the defendant was not placed in double jeopardy by the second trial on the false claim indictment.

*O. Lawrence Mielke*

CRIMINAL LAW—SEARCH INCIDENT TO ARREST FOR TRAFFIC VIOLATION—PLAIN VIEW DOCTRINE—CONSENT.—The defendant was convicted of illegally transporting alcoholic beverages in local option territory. After arresting the defendant for reckless driving, the officer discovered the evidence necessary for the above conviction by looking through an opening between the fender and trunk lid of defendant's automobile. The arresting officer had to assume a crouched or bent-over position before the evidence was visible. After this disclosure the defendant consented to open the trunk. *Held*: Reversed. The mere fact of an arrest for a traffic or other minor violation does not give the arresting officer an absolute right to search the vehicle or premises indiscriminately. There was no reasonable basis for the officer's searching the trunk of the car in connection with the charge of reckless driving. The evidence was not "clearly" or "plainly" visible and the search was not accomplished with the voluntary consent of the appellant. *Johns v. Commonwealth*, 394 S.W.2d 890 (Ky. 1965).

In the past, several cases have upheld searches and seizures

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<sup>8</sup> *Bartkus v. Illinois*, 359 U.S. 121 (1959).

following an arrest for a traffic violation. These cases reasoned that a search incident to an arrest is lawful; the defendant has violated a traffic law; and therefore the defendant is subject to search. Most often cited among these decisions is a Michigan case<sup>1</sup> where the defendant was convicted of possessing liquor. He was arrested for speeding, at which time his automobile was searched and the liquor found. The court upheld the conviction by saying that since the arrest was lawful, it was also lawful for the officers to search the person of the defendant and the vehicle in which he was then riding.

More recently, however, there have been a number of decisions by the supreme courts of several states which have concluded that a search is valid only when the search is made for the "fruits" of the crime for which the defendant is arrested, or is reasonably necessary to protect the officer from attack, or to prevent the offender from escaping a serious charge.

Other limitations have been placed on the power to search incident to traffic violations. In *People v. Mayo*,<sup>2</sup> the Illinois Supreme Court held that the search of a glove compartment following an arrest for parking too far from the curb was an unreasonable search and policy slips found therein were inadmissible. Similarly, in *People v. Molarius*,<sup>3</sup> the court had occasion to examine the legality of a search of an automobile in which suspects were riding when arrested for making an unlawful turn. The court held the search could not be justified as incident to the arrest where it bears no relation to the traffic violation.

In an Oklahoma case,<sup>4</sup> the defendant was convicted of unlawful transportation of intoxicating liquor following a search of the automobile when the defendant passed a car in a no passing zone. While this decision permitted a search of the person and the immediate surroundings for a weapon for the safety of the officer, it condemned the search of the trunk. In a very similar case,<sup>5</sup> the Tennessee Supreme Court also held that a search of the trunk was unjustified.

A recent Kentucky case<sup>6</sup> places us in line with this modern trend by holding that an arrest for a traffic violation does not give the arresting officer an absolute right to search the vehicle. In that case the defendant was arrested for improper passing, and a search of the trunk of the automobile he was driving uncovered the alcoholic beverages which were used to convict him.

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<sup>1</sup> *People v. Davis*, 247 Mich. 536, 226 N.W. 337 (1929).

<sup>2</sup> 19 Ill. 2d 136, 166 N.E.2d 440 (1960).

<sup>3</sup> 146 Cal. App. 2d 129, 303 P.2d 350 (1956).

<sup>4</sup> *Brinegar v. State*, 97 Okla. Crim. 299, 262 P.2d 464 (1953).

<sup>5</sup> *Elliott v. State*, 173 Tenn. 203, 116 S.W.2d 1009 (1938).

<sup>6</sup> *Lane v. Commonwealth*, 386 S.W.2d 743 (Ky. 1964).

It appears that the ground work for this Kentucky decisional law was laid as early as 1920 in a leading case on the subject of search and seizure, *Youman v. Commonwealth*.<sup>7</sup> This case limited a search incident to an arrest to those things connected with the offense for which he was arrested or any weapon which might enable the prisoner to escape or do some act of violence.

The rationale of the above cited cases would seem to easily encompass *Johns* unless, as brought out by the court, it may be said that the alcoholic beverages were in plain view, or the search was made pursuant to the voluntary consent of the defendant.

Many courts have held that if the object is something in plain view, then there is actually no search.<sup>8</sup> The Kentucky Court of Appeals explained what is meant by "plain view" in *Clark v. Commonwealth*,<sup>9</sup> which held that the constitutional guaranty against illegal search does not prohibit seizure without a warrant where there is no need of search; that is, where the outlawed object discovered is visible, open and obvious to anyone who even casually looks about his surroundings. An earlier case<sup>10</sup> upheld the seizure of copper wire which was in plain view in the back seat of an automobile. The court, using these standards, said that the contraband in *Johns* was not plainly visible as the officer would not have observed the beer but for his painstaking inspection of the car.

The court's decision that there was no voluntary consent present in *Johns* is an expression of the better view and follows an abundance of Kentucky precedent.<sup>11</sup>

This decision was the logical result of the fact that defendant was under physical arrest, and had no recourse except to submit to the authority of the officer. As the court said, "his reluctantly given consent was nothing more than yielding to the inevitable."<sup>12</sup>

The *Johns* case reaches a correct and sound result. The Kentucky court has shown great concern for the protection of its citizens' constitutional right against unreasonable search and seizure.

*James W. Barnett*

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<sup>7</sup> 189 Ky. 152, 224 S.W. 860 (1920).

<sup>8</sup> *Koscielsky v. State*, 199 Ind. 546, 158 N.E. 902 (1927); *State v. Christensen*, 151 Ore. 529, 51 P.2d 835 (1935).

<sup>9</sup> 388 S.W.2d 622 (Ky. 1965).

<sup>10</sup> *Childers v. Commonwealth*, 286 S.W.2d 369 (Ky. 1955).

<sup>11</sup> *Smith v. Commonwealth*, 283 Ky. 492, 421 S.W.2d 831 (1940); *Thomas v. Commonwealth*, 226 Ky. 101, 10 S.W.2d 606 (1928); *Witt v. Commonwealth*, 219 Ky. 519, 293 S.W. 1072 (1927); *Duncan v. Commonwealth*, 193 Ky. 841, 250 S.W. 101 (1923); *Mattingly v. Commonwealth*, 199 Ky. 30, 250 S.W. 105 (1923). See also, *Coleman v. Commonwealth*, 219 Ky. 139, 292 S.W. 771 (1927).

<sup>12</sup> 394 S.W.2d at 892-93.